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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 MATTEL INC.,

4 Plaintiff,

5 v.

20 Civ. 11075 (NRB)

6 THE ENTITIES DOING BUSINESS AS
7 GOODMENOW, et al.,

8 Defendants.

Temporary Restraining
Order
Oral Argument
(Via Teleconference)

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9
10 January 19, 2021
5:06 p.m.

11 Before:

12 HON. NAOMI REICE BUCHWALD,

13 District Judge

14 APPEARANCES

15 DUNNEGAN & SCILEPPI LLC

16 Attorneys for Plaintiff

17 BY: WILLIAM I. DUNNEGAN, ESQ.

18 DGW KRAMER LLP

Attorneys for Defendants

19 BY: KATHERINE BURGHARDT KRAMER, ESQ.

JACOB CHEN, ESQ.

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1 THE COURT: Good evening. This is Judge Buchwald.
2 And we're having this call because of the request by the
3 defendants to modify the attachment order that I previously
4 signed.

5 So let's just begin by taking attendance. Who's on
6 the phone for the plaintiff?

7 MR. DUNNEGAN: Your Honor, Bill Dunnegan for Mattel.

8 THE COURT: Okay. And who's on the phone for the
9 defendant?

10 MS. BURGHARDT KRAMER: This is Katie Burghardt Kramer
11 for the defendants, and my colleague Jacob Chen is also on the
12 line.

13 MR. CHEN: Good afternoon, your Honor.

14 THE COURT: All right. Okay. I guess based on your
15 letters, it's my understanding that the defendants have agreed
16 at this time, and without prejudice to a later application
17 concerning the TRO and the attachment, that they've agreed not
18 to object to PayPal holding \$2.8 million; is that correct?

19 MS. BURGHARDT KRAMER: That's correct, your Honor.

20 THE COURT: Okay. And I guess one question to
21 Mr. Dunnegan is: Why 2.8, given that the maximum statutory
22 damages would be considerably less?

23 MR. DUNNEGAN: Your Honor, this is Bill Dunnegan. The
24 answer to that question is that the maximum statutory damages
25 would be \$2,150,000, plus under both statutes -- I believe it's

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1 probably a little bit stronger under the Trademark Act -- the
2 attorney's fees are virtually mandatory. And to run up a bill
3 of 500 or \$650,000 in a case which is going to be as hotly
4 contested as this may be very, very reasonable. In any event,
5 that was the number that --

6 THE COURT: Who decides what's reasonable? Me, right?

7 MR. DUNNEGAN: That is correct.

8 THE COURT: Don't spend it yet.

9 MR. DUNNEGAN: Well, no, your Honor, of course not. I
10 mean, it's just a lodestar amount.

11 THE COURT: Okay.

12 MR. DUNNEGAN: Now there's one other point I would
13 like to make, and that is, the 2.8 is their number. The 2.8
14 that I am talking about is \$2.8 million free and clear of all
15 liens and encumbrances, which could be used to satisfy a
16 judgment. The 2.8 that they are talking about is subject to
17 liens and encumbrances of PayPal, which would represent PayPal
18 claims or claims of customers of PayPal. There's absolutely no
19 record here of how much of the money at PayPal is subject to
20 PayPal's existing liens. I mean, if we look at PayPal's
21 existing liens, which defendants should certainly know the
22 amounts of, there may be nothing here at PayPal, which is
23 attached, which is not subject to a PayPal lien. And if that
24 money is -- if the lien is exercised, then there's nothing here
25 from which to collect the judgment.

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1 THE COURT: And why is it that you think that the
2 attachment is not a more effective or powerful device than a
3 customer claim for a refund?

4 MR. DUNNEGAN: Yes, because our ability to attach at
5 PayPal is no greater than the value of the defendant's assets
6 at PayPal. And if PayPal has a prior security interest in that
7 money as a result of its customer agreement, then at least
8 PayPal is asserting that its lien is senior, and we don't want
9 to get in a fight with PayPal about that.

10 THE COURT: And how much at the moment is the total
11 amount of the money that relates to defendant's accounts at
12 PayPal that have been attached?

13 MR. DUNNEGAN: If that's directed to me, your Honor,
14 PayPal has only notified us that there is \$2.7 million,
15 roughly, which has been attached, and that was as of
16 January 7th. We have learned only through the defendant's
17 counsel that PayPal has apparently identified three other
18 claims which have roughly \$2½ million in them. We've never
19 received any notice from PayPal that that additional money
20 exists.

21 THE COURT: You haven't called to PayPal, your pals at
22 PayPal? You told me at one point that you had a relationship
23 with the attorneys at PayPal, from your prior legal work,
24 right? Because remember you told me that you would be able to
25 get them over New Year's weekend?

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1 MR. DUNNEGAN: Yeah, yeah, and I think --

2 THE COURT: Have you called some of your, as I said,
3 pals at PayPal to inquire of them whether these other accounts
4 that the defendants have disclosed in fact exist?

5 MR. DUNNEGAN: No.

6 THE COURT: And whether PayPal has treated them as
7 subject to the Court's order?

8 MR. DUNNEGAN: Okay. I don't have any reason to
9 believe that the defendant's counsel are in fact saying
10 something which is false. I accept that.

11 THE COURT: Well, but don't you want to know from
12 PayPal how much money of the total amount in the various
13 accounts is under attachment?

14 MR. DUNNEGAN: Yes. Okay. That's an interesting
15 question, but the real question, which I cannot know the answer
16 to because I'm sure PayPal will say it can't determine it at
17 the moment or it will not tell me if it can determine it, would
18 be how much of it is not subject to PayPal's liens. That's the
19 \$64,000, or more, question.

20 THE COURT: If PayPal had \$50 million of the
21 defendant's money in accounts and your maximum claim is, let's
22 say, your 2.8, is there really a concern, seriously, that there
23 could be liens that are over \$40 million?

24 MR. DUNNEGAN: Yes, your Honor, because --

25 THE COURT: Why?

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1 MR. DUNNEGAN: Let me explain why. The \$40 million
2 which PayPal would be holding in your hypothetical would be the
3 result of customers paying PayPal and PayPal holding the money.
4 If the customers never received the merchandise from the
5 defendant, the customers would have the ability to go back to
6 PayPal and say, I did not receive this, I'm entitled to my
7 money back, and PayPal would have to give them back if it
8 obeyed the law. Now you could make an argument that one at a
9 time, customers are not going to do that. But you could also
10 make the argument, based upon reading some of these comments
11 which were at the PayPal community forum, that somebody could
12 very easily bring a class action against these people and
13 the --

14 THE COURT: Sir, do you have a clue, seriously, of how
15 long it takes for a class action to get to the point of
16 judgment?

17 MR. DUNNEGAN: Oh, absolutely.

18 THE COURT: Really, come on. That's what we do in the
19 Southern District. And this case will be over well before any
20 judgment in a class action.

21 MR. DUNNEGAN: Right, but see, your Honor, the class
22 action lawyer is subject to the same attachment statute that I
23 am --

24 THE COURT: Oh, no.

25 MR. DUNNEGAN: -- so they could bring -- a class

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1 action could be brought in New York State Court or any of the
2 other courts in the United States.

3 THE COURT: You don't think that first in time is
4 first in right here, that this Court's order isn't first in
5 time and first in right?

6 MR. DUNNEGAN: I don't think so if that's for a refund
7 of the money which should not have been gotten to PayPal in the
8 first place because there was not a delivery of the product.
9 For example --

10 THE COURT: This is so unrealistic. This is as if the
11 entire business of the defendants is so ephemeral that we've
12 just got thousands and thousands and thousands of people
13 ordering from the defendant not getting their merchandise and
14 seeking returns on PayPal, but somehow or other, there are
15 millions of dollars at PayPal. I mean, yes, your arguments are
16 fascinating theoretically, but they seem awfully theoretical to
17 me.

18 MR. DUNNEGAN: Well, your Honor, I don't know if you
19 had an opportunity to look at it, but the comments that we sent
20 in, filed electronically as Exhibit B to my last letter,
21 demonstrate -- I've never seen anything like this. There are
22 hundreds, literally hundreds of comments from people saying,
23 this is a scam, we did not receive the merchandise we were
24 promised. Now as an absolute number, maybe a few hundred or a
25 couple hundred wouldn't make any difference, but these were the

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1 people who were taking the time to comment publicly on PayPal,
2 and there's no defense here on the merits. The same thing
3 happened to us that happened to all of these other people who
4 are commenting that they did not get the merchandise. Now --

5 THE COURT: Well, that's not what happened to you,
6 right?

7 MR. DUNNEGAN: Yes, it is what happened to us, your
8 Honor. We paid for the merchandise. Their website said it was
9 delivered, and it was not delivered. Now if you want to take
10 that a step farther and say, oh, gee, is that just something
11 that went wrong in the delivery of the mails? And I agree that
12 there are sometimes problems with the delivery of the mails.

13 THE COURT: Excuse me, since I did not assume that
14 that was the fact. How many times did you order one of these
15 dolls? Just once?

16 MR. DUNNEGAN: We made one order --

17 THE COURT: To get jurisdiction.

18 MR. DUNNEGAN: -- just to make sure they were actually
19 somebody who would take our money rather than just a fishing
20 site. And jurisdiction is certainly part of it.

21 THE COURT: Yes. But you never really tried to
22 actually get a doll?

23 MR. DUNNEGAN: We did. We paid for a doll. They told
24 us --

25 THE COURT: I know. But you never physically got a

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1 doll?

2 MR. DUNNEGAN: That is correct.

3 THE COURT: And you never tried again?

4 MR. DUNNEGAN: No, because --

5 THE COURT: You don't think your case would be
6 stronger, theoretically?

7 MR. DUNNEGAN: It might be, but let me get you to a
8 specific page of a specific document we filed.

9 THE COURT: You're going to have to -- it takes an age
10 to pull up your --

11 MR. DUNNEGAN: I can read it to your Honor just for
12 the record.

13 THE COURT: I'd rather look at it, okay, and then you
14 can read it into the record, okay?

15 MR. DUNNEGAN: Sure.

16 THE COURT: I'm not sure I'm going to be able to find
17 it. Do you know what page of your ECF filing it is?

18 MR. DUNNEGAN: Yes, I do, your Honor.

19 THE COURT: What is it?

20 MR. DUNNEGAN: It's page 5 of 13 in Document 24-2.

21 THE COURT: Okay. I'm sorry. I don't know that I can
22 find that. That's not the way it's been sent to me. I'm
23 sorry. Maybe you should just read it, because I don't know if
24 I can find it.

25 MR. DUNNEGAN: Your Honor, I did send a paper copy in,

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1 which was delivered earlier today.

2 THE COURT: But I'm not at the office.

3 MR. DUNNEGAN: I understand. Okay. It says -- this
4 is one page of the offering page from a feelitnice.com, and
5 then there are some further delineations. "We plan to sell
6 1,000 sets, until now, we have sold 500 sets. Time is limited.
7 First come, first served." And it continues. Now the
8 important thing about this is not that they say that they've
9 sold 500 sets of a product, but it's 500 sets that they claim
10 to have sold of a very specific collector's item of doll. They
11 are proposing to sell the "Day of the Dead" doll from 2019 and
12 2020 for \$35 apiece. Now if you are Mattel's best customer,
13 you cannot buy that doll for less than \$35 apiece. That's for
14 the 2020 doll. For the 2019 doll, Mattel is completely sold
15 out, and the only trading of those dolls is by collectors on
16 the internet. And earlier today I put into, I think it was
17 Google, "Mattel 'Day of the Dead' 2019 doll," and a whole bunch
18 of dolls come up on eBay which are offered for sale, and they
19 were offered for sale between \$300 apiece and \$500 apiece. So
20 the idea that this company is selling, actually selling genuine
21 dolls in this quantity for this price just cannot stand. It
22 can't withstand the smell test. There's something going on
23 here which is wrong. Now it could be that they're making a
24 counterfeit doll and they're selling that as a genuine Barbie
25 doll and you know that when you get it, but based upon all this

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1 information from paypal-community.com, it appears that what
2 they are doing is taking the order, keeping the money at
3 PayPal, and not delivering the product, and then telling the
4 people at PayPal, with some false information, that the product
5 has been in fact delivered to the customer and PayPal is
6 releasing the money. There are so many comments out there on
7 these pages from paypal-community.com that it's overwhelming.

8 THE COURT: Okay. And your theory is that despite
9 what you are contending is this massive flood of complaints,
10 that PayPal doesn't care at all about its reputation so that
11 PayPal is releasing the money to the defendants and somehow not
12 satisfying the PayPal customers and that that's what's going
13 on? Or is there another business model where the customer
14 gives the money to PayPal, PayPal holds it, and then doesn't
15 release it to the defendants, which isn't a good business
16 model? I mean, your theory is that PayPal is more than
17 delighted to participate in what you're alleging is defendant's
18 across-the-board scam, that PayPal doesn't care?

19 MR. DUNNEGAN: Your Honor, if you look at the
20 paypal-community.com website, we put in this paper, about 150
21 pages or so, and this is not just some random site off the
22 internet; this is a PayPal-owned site.

23 THE COURT: I get it.

24 MR. DUNNEGAN: Okay. PayPal is allowing these people
25 to post that information on that site, and something here is

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1 not making 100 percent sense because I don't think that PayPal,
2 you know, itself is a racketeering enterprise, but something is
3 going wrong, and we don't know what it is, and defendant isn't
4 telling us what it is. I mean, it would be very easy for
5 defendant to say, oh, we're such a big operation, we made
6 \$19 million a year in the fourth quarter of 2020, we'll just
7 post a bond for the \$2.8 million that we say should be held.
8 Problem solved. Or they could tell PayPal to wire \$2.8 million
9 and the Court would hold it, as opposed to having PayPal hold
10 it. And I don't see how the defendant would be prejudiced by
11 that in any respect, except they can't do it, because all the
12 money is being lienied by PayPal; it's held as cash collateral
13 for claims which are asserted against PayPal. That's the only
14 thing that makes sense.

15 THE COURT: So PayPal is holding the money and they
16 don't release it to the defendants, on your theory.

17 MR. DUNNEGAN: That is correct. And your Honor, don't
18 believe me; don't take my word for it. If you look at the
19 second page of the letter that the defendant submitted on
20 January 18th -- and I can wait or I can read. You tell me.

21 THE COURT: Is that their reply letter?

22 MR. DUNNEGAN: It is.

23 THE COURT: That I can find.

24 MS. BURGHARDT KRAMER: Your Honor, if I may, I'm happy
25 to address many of these points at whatever point you want us

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1 to.

2 THE COURT: I assure you, you will get your chance.

3 MS. BURGHARDT KRAMER: Thank you.

4 THE COURT: Okay. I have the January 18th letter up.
5 What page do you want me to look at?

6 MR. DUNNEGAN: Page 2 of 3.

7 THE COURT: Okay. I got it.

8 MR. DUNNEGAN: The first -- in the third full
9 paragraph, the one that begins, "Plaintiffs ask defendants,"
10 and if you could look at the last two sentences of that
11 paragraph where it says, "During normal operations, defendants
12 are required to maintain both a fixed deposit and a revolving
13 deposit in their PayPal accounts. These deposits are
14 substantial, and they are required under the standard terms of
15 their agreement with PayPal." Now what that leaves open is,
16 well, they say "substantial." What does that mean in terms of
17 dollars? Are there more liens on these 5 or so million dollars
18 than \$5 million? We just don't know. They know. They're not
19 telling us.

20 THE COURT: Okay. Why don't we hear from defendant's
21 counsel.

22 MS. BURGHARDT KRAMER: Thank you, your Honor. This is
23 Katie Kramer for the defendants.

24 I'd like to bring us back to the point of what we're
25 asking for here. The harm that's being inflicted on defendants

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1 is pretty soon going to be irreparable if there's no
2 modification. The business has been shut down. The defendants
3 rely on the PayPal account to operate their business. They are
4 unable to do so at this time. We've put the plaintiff on
5 notice that if this continues, we do intend to seek damages for
6 that harm. The harm is quickly accruing. In normal course of
7 operations, there would be a lot of activity in these accounts.
8 There would be a lot of commerce and there would be a lot of
9 funds coming through. Our client is being denied that
10 opportunity as a result of this order, and we're here,
11 really -- it's an urgent, desperate plea for some sort of
12 modification. The reason that we -- go ahead.

13 THE COURT: Well, plaintiff's counsel is not saying, I
14 want to keep all of the money that is at PayPal under
15 restraint. What he's saying is, you know, working from what
16 admittedly is a kind of a maximum number of 2.8, all he's
17 saying is, I want to be sure that if I win this case, the money
18 will be there, and since I, the plaintiff, have succeeded in
19 persuading a court to give me this attachment order and I found
20 considerable funds at PayPal, I'm not seeking to keep them all
21 there, I am just seeking to be secure to the tune of 2.8 for
22 now, and then, you know, whatever the defendant's challenges
23 may be to the attachment order *ab initio* beyond the amount, or
24 we can litigate that, and we shall. So all he's asking is,
25 given that he doesn't have full access to the situation at

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1 PayPal, he does not know what part of these funds are subject
2 to some preexisting lien by PayPal itself, at a minimum, he
3 says, for now, I just want to know that I'm good up to a
4 certain amount, and is there some reason why, if there are
5 multiples of that at PayPal, the defendant cannot offer
6 plaintiff, and a sense the Court, the certainty that the 2.8 is
7 available, at least for now?

8 MS. BURGHARDT KRAMER: To start out with, I want to
9 make it clear that the reason that we said 2.8 was that we
10 didn't want to fight over the number. We knew that 2.8 was a
11 number that was acceptable to the plaintiff.

12 THE COURT: Right.

13 MS. BURGHARDT KRAMER: And what we want is we just
14 need this to be cabined for now so that we can resume
15 operations. We picked 2.8 because we knew there wouldn't be a
16 fight over that number. In reality, the damages here are low
17 and, you know, 2.8 is really a "pie in the sky" number for
18 where the damages could end up in this case. I don't think
19 it's a realistic number. When we file papers later this week,
20 we intend to put in some more information about, you know, the
21 scope here. You know, we heard plaintiff's counsel talk about
22 the potential for 500 sales. If, in his view, there were 500
23 sales of this product, maybe 10 percent profits on the product
24 that were sold for about \$30 each, then, I mean, the profits
25 under that calculation are minuscule.

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1 THE COURT: Listen, I'm not questioning that 2.8 is,
2 if you were to bet, unlikely to be the outcome here, and I'm
3 not saying that it's the right number, but my understanding was
4 that, for the reasons you said, for now, in effect, you're
5 willing to humor the plaintiff so that the remainder of their
6 attached funds could be released. I understand. I'm not
7 taking your position as anything other than practical, and I'm
8 not taking it as some kind of concession that, you know, 2.8 is
9 where this case is going to wind up. But his point is,
10 whatever the number was --

11 MS. BURGHARDT KRAMER: Well, your Honor, it's
12 speculation. It's just speculation. As your Honor pointed
13 out, plaintiff's counsel has apparently made no effort to
14 figure out if there are liens. The idea of the lien is based
15 on some boilerplate language.

16 I also want to bring this back to the point that
17 Yokawa Network is a successful, thriving e-commerce business,
18 or at least it was up until this attachment order. If we're
19 able to resume operations through these PayPal accounts, there
20 will be additional funds. Yokawa Network is collectible. This
21 isn't a fly-by-night operation with \$5,000 in a bank account
22 somewhere.

23 THE COURT: The point is, I mean, what is the
24 reluctance to put the money up in a way that there's no
25 question that it will be available?

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1 MR. CHEN: So, your Honor, if I may jump in here
2 briefly. This is Jacob Chen on behalf of defendants.

3 So the accounts here, the PayPal accounts, are all
4 Hong Kong accounts. They were opened in Hong Kong. One of the
5 arguments we plan to raise in our opposition papers is that
6 they're not subject to attachment because they are not in New
7 York. So what the plaintiffs are trying to do is they're
8 trying to get from the Court a relief they're not entitled to,
9 which is having the money withdrawn from a Hong Kong account
10 and put into a New York account to give them *in rem*
11 jurisdiction. They're using the attachment motion to acquire
12 *in rem* jurisdiction over assets that they simply don't have
13 jurisdiction over. Right now, for the accounts to be left in
14 their Hong Kong PayPal account, we'll present the argument to
15 the Court -- we'll explain to the Court why they're not subject
16 to attachment, and I think that's fine and there's still the
17 full 2.8 million in it, which is, our position is, way above
18 and beyond what they would actually be entitled to, but
19 certainly is the maximum.

20 And regarding the argument about a lien, this isn't
21 just basically plaintiff's pure speculation. It is actually
22 impossible for us to prove a negative. In order for us to
23 prove that there is no lien, we would need to give plaintiffs a
24 time machine and have them watch our accountants deal with
25 every single book and record entry and to show them every

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1 single transaction for all the products that the company sells
2 and allow them to look over it, and it's impossible for us to
3 prove that the company has no liens whatsoever or the liens
4 don't equal any certain amount, which is why, if the plaintiffs
5 are seeking attachment, they bear the burden of telling the
6 Court why this \$2.8 million in the PayPal account is not
7 enough. And they try to meet that burden by bringing some
8 hearsay, inadmissible testimony from some reviewers, who could
9 very well be false. It is a very common practice in the
10 e-commerce industry for competitors to create and generate
11 false reviews in order to shut down and make life difficult for
12 competitors. They have not brought in any affidavits, they
13 have not reached out to any of these alleged reviewers, they
14 have not presented the Court with any admissible evidence of
15 one, and not to mention of the tens of thousands that they
16 would need to show that there is actual or real risk that the
17 money in the PayPal account, assuming that it is in fact
18 subject to jurisdiction, would not -- it would not be possible
19 for that money to disappear all at once and leave the plaintiff
20 unable to satisfy a judgment.

21 THE COURT: So you're saying that the PayPal accounts
22 are in effect a bank account in Hong Kong.

23 MR. CHEN: That's correct, your Honor. They were
24 opened by the defendants with PayPal in Hong Kong, as a Hong
25 Kong PayPal account. And the address on the PayPal account is

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1 also in Hong Kong, which the plaintiff can verify. They have
2 received records from PayPal, and they can confirm that the
3 accounts all have a Hong Kong address on it.

4 THE COURT: And when an American consumer purchases a
5 product that the defendant has placed for sale on the internet
6 and they pay for it through PayPal, the money goes directly
7 into a Hong Kong account, doesn't pass through the United
8 States?

9 MR. CHEN: I think there are certain vendors on both
10 the PayPal side and banking side that deals with the transfer
11 of the funds and the conversion, but I do know the money
12 eventually goes to a PayPal Hong Kong account, and the money at
13 issue here, all the accounts are Hong Kong PayPal accounts.
14 Whether or not there is one more intermediary before it hits
15 the defendant's PayPal Hong Kong accounts, I'm not sure of.
16 PayPal would know the answer to that. But everything that's
17 being attached currently is a Hong Kong PayPal account.

18 THE COURT: Mr. Dunnegan, have you attached --

19 MR. DUNNEGAN: Well, your Honor --

20 THE COURT: Have you attached, in effect, Hong Kong
21 bank accounts?

22 MR. DUNNEGAN: Well, I don't think it is a Hong Kong
23 bank account. When he says it's a Hong Kong PayPal account,
24 what he's saying is, the address that was used to open up the
25 account was in Hong Kong or China. That does not make the

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1 money that the US consumer pays not subject to US jurisdiction.
2 We have PayPal, which is located on the West Coast, telling us
3 that it has frozen \$2.7 million. If their answer was, oh, we
4 don't control that, that's some other Hong Kong entity, then
5 that would have been our answer from PayPal on the West Coast.
6 But it wasn't. It was, we've frozen this money, and we admit
7 that we're subject to the jurisdiction in New York. Now, your
8 Honor, this point wasn't made anywhere in their papers.

9 THE COURT: Right. It is news to me, but look,
10 Mr. Dunnegan, you have a \$5,000 bond up, which there's no
11 relationship to the millions of dollars, you know, that have
12 been attached possibly, you know, improperly. I don't know.

13 MR. DUNNEGAN: Well, but that's --

14 THE COURT: Something has got to be resolved. Either
15 you're going to be asked to increase your bond or you're going
16 to have to figure out some way that some of their money is
17 released. I mean, if you have succeeded in bringing them to a
18 total halt, that is disproportionate harm to the claim here.

19 MR. DUNNEGAN: I totally understand, and that would be
20 a valid point if that were what in fact has happened. Let's
21 take those one at a time. In terms of the amount of the bond,
22 they haven't asked that it be increased. If they --

23 THE COURT: Well, I'm concerned --

24 MR. DUNNEGAN: Yes, no, I understand that.

25 THE COURT: -- all right? I don't feel that that

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1 \$5,000 is remotely putting you, Mattel, at the potential risk
2 it ought to be, because right now, so you lose 5,000, you don't
3 care. But you have to care a little more.

4 MR. DUNNEGAN: Oh, I completely -- I don't disagree
5 with your Honor. I don't disagree. No one has raised that
6 issue. I did not purport to address that. It sounds to me
7 like that is a reasonable point to be made. But that's not the
8 point that the defendants are making on this motion.

9 THE COURT: Well, that may be, but it's my order.

10 MR. DUNNEGAN: I understand. I understand. And look,
11 if your Honor determines that that bond should be increased,
12 that's your discretion, your Honor. I'm not going to say that
13 we're going to give up this attachment rather than increase the
14 bond. I mean, that's just the cost of doing business to meet
15 the requirements.

16 THE COURT: I don't think that Mattel wants to put
17 millions of dollars on the table, possibly, over this doll.

18 MR. DUNNEGAN: Well, here's --

19 THE COURT: I mean, look, there's got to be some way,
20 on a temporary basis -- and I'm speaking to the defendants here
21 as well -- to create some real security for the plaintiff's
22 claim while we expeditiously figure out whether the attachment
23 is, in effect, effective or not, proper or not, what the
24 actual, realistic, you know, damages can be here. I don't
25 object to working hard to figure out these answers quickly, but

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1 I do think there needs to be something in place which both
2 permits the defendant to operate and the plaintiff to have some
3 genuine security.

4 MR. DUNNEGAN: Your Honor, this is Bill Dunnegan. May
5 I ask one question. I think I can cut through this. Can the
6 defendants tell us how much money at PayPal is not subject to a
7 PayPal lien, meaning how much money could the defendants wire
8 out of those 11 accounts this moment?

9 MS. BURGHARDT KRAMER: Well, your Honor, at this
10 moment the answer is none, because it's all frozen.

11 MR. DUNNEGAN: But for the attachment. You know what
12 I mean.

13 MS. BURGHARDT KRAMER: But for the attachment, there
14 is -- as we say in the reply, there's a certain amount that
15 PayPal requires just as a standard part of --

16 THE COURT: What's the percentage of the charges
17 through PayPal?

18 MS. BURGHARDT KRAMER: I don't recall what the
19 percentage is. The reserve amount I think is -- ballpark, I
20 think it's about 1.5 million. Maybe. I have to look back and
21 get a more precise number. But essentially it's not a lien,
22 but it's a reserve amount that has to stay in the account.
23 There's a fixed amount that has to be paid in as a deposit, and
24 then there's the revolving amount that essentially just creates
25 a buffer so that if there's a charge-back, if there's a product

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1 return, whatever, PayPal wants to make sure that there are
2 funds that are sitting there, but the money flows through. So
3 that's the money that would -- my understanding is that that
4 money would still be required by PayPal -- even if these
5 certain accounts stay frozen and then other accounts become
6 operational again, that there would still be a deposit
7 requirement because PayPal needs to have that and they would --
8 then there would be some amount of money that would have to
9 stay even in the unfrozen accounts to give that buffer.

10 So all I'm hearing from the plaintiffs is a lot of
11 speculation about this idea of, you know, what if there are
12 liens. We're offering to keep \$2.8 million in these accounts,
13 which we say is an excessive amount of money based on where the
14 attachment order should end up. We have excellent arguments,
15 in my opinion, about why the attachment should be completely
16 vacated. Those issues are not yet briefed, but we have a
17 briefing schedule, and we intend to get all of that before the
18 Court by the end of this week. We have arguments for why the
19 attachment should be vacated altogether. As Jacob said, this
20 money is in Hong Kong. It's outside the Court's jurisdiction.
21 We have other arguments as well. In addition, if the Court
22 doesn't look favorably on those arguments, we have very strong
23 arguments for why 2.8 or, you know, a number like that is
24 excessively high. And if there ends up being an attached
25 amount, it needs to be much, much, much, much lower than the

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1 amount that we're saying for now, because that creates a
2 buffer, that creates a comfortable range that, you know, if we
3 give Mr. Dunnegan's speculation some credence and say maybe
4 PayPal has a small amount of a lien on this money, it's not
5 going to be the whole thing, maybe a tiny amount, and I don't
6 have any reason to think that there would be, but even
7 indulging in the speculation to say even if there was a small
8 amount subject to a lien, we still have plenty of buffer there.
9 We have plenty of buffer between the 2.8 and what the damages
10 would be in a case like this and where things may be going with
11 the attachment.

12 So from our perspective, what we want -- sorry,
13 Jacob -- is to be able to resume operations. There's no reason
14 to change the current procedure, change the current mechanism.
15 The money is safe with PayPal. I have no reason to doubt that
16 PayPal's going to act honestly in this situation, hold the
17 money. They'll hold the money. It's just temporary. It's
18 just temporary. And then your Honor will have a chance to look
19 at this in a lot more depth once we submit our briefing and
20 once all the issues are aired. We just desperately need to
21 resume operations, and are proposing to do so in a way that
22 still gives plenty of security for the plaintiff. And I truly
23 don't hear anything from Mr. Dunnegan other than speculation
24 and kind of, you know, "what ifs" and a whole series of red
25 herrings.

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1 And Jacob, please go ahead.

2 MR. CHEN: Yes. And one thing I do want to add, that
3 the only numbers that plaintiff has actually provided was a
4 figure of 500. At \$30 per doll, at 10 percent profit, we're
5 talking about 1500; at a hundred percent profit, we're talking
6 about 15,000. So the amount that should be held really is in
7 between 1500 and 2.8 million. But it's a lot closer to the
8 1500 than the 2.8 million. So the idea that if \$2.8 million
9 was held and it is not enough security is just simply not
10 supported by any of plaintiff's submissions to the record --

11 MR. DUNNEGAN: Your Honor --

12 MR. CHEN: -- other than speculation.

13 MR. DUNNEGAN: Your Honor, can I respond for 30
14 seconds?

15 THE COURT: Sure.

16 MR. DUNNEGAN: I asked the question, how much money is
17 not subject to a lien and could be taken out. I did not get an
18 answer to that question from defense counsel. They're talking
19 about -- they use words like, "oh, not a lot," or, "plenty of
20 buffer," but there's no assurance whatsoever that they have
21 provided that PayPal doesn't have a lien on this entire amount.

22 THE COURT: But what is the logic that they have a
23 lien on the entire amount?

24 MR. DUNNEGAN: Because the logic is that under their
25 agreement, PayPal has to be sure that customers are not going

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1 to immediately show up and have a refund, because if they
2 release the money from the defendant during a certain period of
3 time, which can be as long as 180 days, that PayPal is going to
4 have to give the money back to the customer and have no
5 recourse against the seller. PayPal doesn't like that
6 situation. They want to be holding the seller's money so if
7 they have to give a refund, PayPal is not out of pocket. Now
8 we don't know the numbers, but --

9 THE COURT: That's right.

10 MR. DUNNEGAN: -- the numbers must be within the
11 control of the defendant. The defendant must be able to look
12 at a statement from PayPal online at this moment and say, oh,
13 we are entitled to withdraw X dollars, okay? That's the number
14 that I'm looking for. And defendants are not providing it.
15 They're saying, well, we got to leave a substantial amount
16 there, but they're not providing any quantification that gives
17 us any assurance as to whether or not that's going to satisfy
18 any more than a nominal judgment. I mean, worst case for the
19 defendant, if they want to resume operations and they're such a
20 substantial enterprise, they can post a bond for \$2.8 million.

21 THE COURT: But they're saying that that would give
22 you something that maybe you have absolutely no right to have.
23 They're saying that their putting money into a New York court
24 may affect their jurisdiction argument. That's what they're
25 saying.

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1 MR. DUNNEGAN: Okay. I didn't hear that raised before
2 today, but the bond would be -- the bond would be
3 conditioned -- they could write the bond in such a way that it
4 would satisfy us that it would be conditional upon the
5 attachment being valid. I mean, if they want, if they say they
6 can run away with all of this money because they're in Hong
7 Kong and not the United States and the Court agrees with them,
8 well, maybe that's just the way it is. But what I hear them
9 saying is that we have an uncertain amount of money that we're
10 entitled to right now and we want to grab whatever we can and
11 leave the plaintiff with some accounts where there's PayPal
12 liens on them, which may not be very much, if anything, to
13 satisfy a judgment, and that's not satisfactory to us, and I
14 don't think it should be to the Court.

15 THE COURT: I don't find any of this satisfactory,
16 okay?

17 MS. BURGHARDT KRAMER: Your Honor, if we're able to
18 resume operations, then there will be additional funds flowing
19 through which can then be held to satisfy any of these
20 extremely speculative liens that PayPal may have.

21 THE COURT: But the problem is that on the one hand,
22 you're arguing that there's no money in the United States and
23 that's why the whole attachment is a worthless piece of paper.
24 That's your argument, right? That's your argument about why
25 the attachment ought to be vacated.

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1 MR. CHEN: Yes, that's correct. That's one of our
2 arguments about why the attachment must be vacated, because the
3 accounts are in Hong Kong.

4 THE COURT: I got it. So that means that your
5 position is that it doesn't matter how much money is in these
6 accounts. None of it's really here. There's nothing there
7 that provides any security to the plaintiff.

8 MR. CHEN: Well, if the Court agrees that the accounts
9 are in Hong Kong upon the full briefing, then they're not
10 entitled to an attachment and therefore, they're just not
11 entitled to attachment, period. The attachment would be, from
12 the beginning, not correctly issued. And if the Court
13 disagrees that the account is in New York, then the amounts
14 that are in it is attached and will remain attached. So they
15 shouldn't get a relief that they wouldn't be entitled to
16 anyway; and if they are entitled, then the relief that they
17 get, the attachment will protect their interests. So reducing
18 the attachment from 5 million to 2.8 million doesn't put
19 plaintiff in a worse -- actual worse position; it just puts
20 them in the same position that they are, and then if they can
21 prove the accounts are in New York, then they have an
22 attachment of a sufficient amount, and then if they can't, then
23 putting a higher attachment will only give them more leverage
24 to, you know, put a lot of pressure on my client -- on our
25 client.

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1 THE COURT: Hold on one second. Please just hold on
2 one second.

3 Sorry.

4 MS. BURGHARDT KRAMER: Your Honor, I assume that any
5 order that the Court would issue would be without prejudice to
6 the plaintiff being able to file papers to increase the amount
7 of the attachment, correct? So if they were able to find
8 additional information about, you know, the extent of the
9 liens, then they could pretty quickly -- we're talking about a
10 short time, a short-term period right now, between where we are
11 today and hopefully getting all of the issues briefed and
12 getting a decision on, you know, a fully aired-out discussion
13 of what's happening with the attachment. Is there so much risk
14 to the plaintiff if we cut it off at 2.8 held in the PayPal
15 accounts today, without prejudice to the plaintiff being able
16 to argue that amount should be increased because, you know,
17 they can find some evidence that there's some amount of that
18 that has a higher-priority lien by PayPal, so that amount is
19 ephemeral for attachment purposes; it would be without
20 prejudice to them briefing that issue in relatively short
21 order.

22 THE COURT: It does sound like there's going to have
23 to be some discovery from PayPal to clarify.

24 MR. DUNNEGAN: I would agree with that, your Honor.

25 THE COURT: The whole way that this works -- because I

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1 surely don't know. I don't even have a PayPal account. So on
2 that point of jurisdiction, on the point of what reserves
3 PayPal has, just how it works.

4 All right. One thought that comes to mind. Given
5 really that much of what we're talking about is speculative,
6 both the facts and the legal arguments, Mr. Dunnegan, what if a
7 million dollars is released from the PayPal accounts to the
8 defendants to enable them --

9 MR. DUNNEGAN: Your Honor, the problem is is that
10 there may not be more than a million dollars which is there. I
11 mean, Ms. Kramer said earlier in the conversation that there
12 was a \$1.5 million amount that had to be held there, and in
13 addition to that, there was a revolving amount. So we don't
14 know what the revolving amount is. So to say --

15 THE COURT: Okay, okay. But it's speculative, sir. I
16 mean, you really don't want to be in the position of, if in
17 fact you are bringing a business to a halt, and possibly
18 improperly, and that the damages you're causing to the
19 defendant is far greater than the damage caused to the
20 plaintiff is not a good situation. I mean, you know that
21 businesses are allowed to continue to operate even in the
22 context of litigation, right?

23 MR. DUNNEGAN: Absolutely, your Honor. Absolutely.

24 THE COURT: And it is just not a realistic scenario
25 that in fact there's really no money there at all, that it's

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1 all really subject to, you know -- that's already all spoken
2 for, both by PayPal and by customers.

3 MR. DUNNEGAN: Okay. Your Honor --

4 THE COURT: That's not a good business model.

5 MR. DUNNEGAN: First of all, your Honor, the answer to
6 that question would lie solely within PayPal or the defendant,
7 and the defendant isn't telling us the answer. If the answer
8 is there is something left, let's get the amount which
9 defendants can put in a -- wire into the court or put in a
10 segregated account somewhere so that we know, rather than take
11 a guess, that these substantial amounts of money are going to
12 be able to, you know, secure a judgment that comes down the
13 road. I mean, right now the defendant has information, they're
14 not telling it to us, they're saying, we're out of business,
15 even though they're not, and they're saying, oh, let us take a
16 million, you know -- the suggestion has been made to take a
17 million dollars out of these accounts, hand it to defendants,
18 and there's no assurance that there is anything else there
19 beyond -- I mean --

20 MR. CHEN: Your Honor, plaintiff really has the cart
21 in front of the horse. Pretty much they've just admitted that
22 they don't actually know. They're just really making stuff up
23 and telling the Court, well, we don't know anything and
24 therefore you should attach all the accounts of defendants. I
25 don't think PayPal even really honestly knows. I don't think

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1 they can produce you a number arbitrarily about how much
2 potential lien there is. Again, this is entirely plaintiff's
3 speculation. They don't have an affidavit from PayPal saying
4 that there's some amount of money that has to be held. They
5 don't have an affidavit from PayPal saying any amount of money
6 has to be held. They're basically saying, maybe this money has
7 to be held, we don't really know, and we just want the Court to
8 issue an attachment anyway. If the Court reduces the
9 attachment and plaintiff can get discovery that shows that they
10 actually have some legitimate grounds for a specific amount,
11 they can go back to the Court and seek an adjustment. But
12 until then, the Court should not entertain plaintiff's
13 speculation about the amount and shift the burden, which is on
14 the plaintiff, to PayPal or defendant or any other party when
15 plaintiff bears the burden of putting to the Court evidence to
16 support the relief that they are seeking.

17 New York case law makes it very clear that with
18 respect to the issue of an attachment, it is the plaintiff, the
19 moving party, plaintiff that bears the burden, a heavy burden,
20 of providing the evidence in favor of the attachment. And the
21 amount.

22 And I'd be happy to cite the case law if the Court
23 would like, and of course this will be mentioned in much more
24 detail in our opposition papers, but I could give them to the
25 Court now, which shows that under New York case law, which the

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1 federal court follows with respect to an attachment under New
2 York law, it is the plaintiff that bears the burden of proof
3 and the evidentiary burden of proof in support of the
4 attachment.

5 MR. DUNNEGAN: Your Honor, there's another fact that I
6 dug up on the PayPal statements after the issue of reserve
7 account was raised, and I'm looking at the account, the PayPal
8 account which is under the email address yougoodplus@163.com,
9 and the amount that PayPal told us that was restrained in that
10 account was \$1.372 million and change, and then when I look
11 farther on the same spreadsheet, there's a column which says
12 Rolling Reserve Balance, and the amount in that column is
13 \$1.174 million. So of that, what appears to be, if I'm reading
14 this correctly -- and I haven't had anybody from PayPal tell me
15 what this means -- it appears there would be roughly 150 to
16 \$180,000 in that account, which appears to have \$1.3 million in
17 it.

18 MR. CHEN: I think what it meant was that because of
19 the Court's order, this is how much they're holding, this is
20 how much money is coming into the account, so that's probably
21 the difference between the amount of money that is already in
22 the account and is held and the amount of money that is coming
23 into the account and that will be held once the money enters
24 into the account. But also, as plaintiff's counsel admits,
25 they don't actually know. They have not sought discovery.

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1 They have not obtained any information from PayPal in support
2 of their speculation about what lien PayPal may or may not have
3 and the priority of that lien, if it exists. They have not put
4 in any papers to show that PayPal has some prior lien over the
5 Court's judgment or that they have any real ability to simply,
6 like, take the millions of dollars in the account in the case
7 that the Court issues an attachment and in the case that
8 plaintiff does ultimately prevail. In fact, the only thing
9 they've shown is that PayPal is willing to do whatever it is
10 that the Court orders, and if the Court orders the attachment,
11 PayPal has shown no indication or willingness to take or touch
12 any of the attachment.

13 MR. DUNNEGAN: Your Honor, I'm not sure I understood
14 that, but I think I have two points. One is that the acid test
15 to determine whether or not PayPal is actually asserting a lien
16 on these amounts is to see how much money that the defendants
17 can withdraw from PayPal if PayPal was directed to, pursuant to
18 Court order, to move the funds somewhere else. I suspect it's
19 not going to be a tremendously substantial amount of money and
20 it's not going to be anything close to \$5 million.

21 The second point I wanted to make is, there's a reason
22 that there's \$5 million of the defendant's money at PayPal.
23 The defendants are not deciding, gee, let's earn no interest on
24 this money and let it sit at PayPal for the fun of it. That
25 money is -- I mean, I don't know what's happened in the last

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1 two weeks, but money is sitting at PayPal, the inference is, to
2 me, that's because it's got to sit at PayPal because PayPal
3 won't release it. I mean, nobody lets money sit in a bank --
4 PayPal is essentially a bank -- interest free when they could
5 take it out and earn some money on it.

6 MR. CHEN: Again, this is just what plaintiff's
7 counsel imagines.

8 THE COURT: But the problem, Mr. Dunnegan, is that
9 this is all speculation, and the defendants are saying, because
10 of this attachment, you've shut down their business.

11 MR. DUNNEGAN: Okay. If I may --

12 THE COURT: And that's a serious matter, which you
13 should be concerned about, because, you know, we had all this
14 conversation about 2.8, but that is a number that is the
15 highest possible number that you would ever recover here. So,
16 you know, it's one of these things where it's this psychology
17 of, you know, you pick a number and then all conversation sort
18 of -- it's like the sentencing guidelines. They're very high,
19 so it kind of gets you to focus at a high number, which may be
20 a totally unrealistic number, or unfair number. And that's
21 what's sort of going on here. You have everybody thinking
22 about 2.8, which makes every assumption in your favor, which
23 may be a phenomenal multiple of the either actual harm to
24 Mattel or actual sales and --

25 MR. DUNNEGAN: Your Honor, for purposes of this series

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1 of letter motions, they conceded 2.8 was their number. We
2 agreed with them for purposes of these series of motions. The
3 only thing we're really debating now is whether or not -- well,
4 one, is there really \$2.8 million in these accounts. I have my
5 doubts, because I see PayPal asserting liens on them and I see
6 sophisticated defendants leaving money interest free. Doesn't
7 make sense. I think the defendants can't get that money out
8 because PayPal is asserting liens against it. Now the simple
9 way to do it is to take some of that PayPal money and move it
10 somewhere else, whether it's the court or an escrow account at
11 some mediation service or some law firm. But the idea that
12 we're just going to whack off some amount of this money because
13 the defendants are telling us that their client is so big that
14 they'll be able to pay any judgment rendered in this case when
15 they can't get through ten days or two weeks without paying
16 their suppliers, just does not seem to me like it is making
17 sense. I mean, the order doesn't require them to stop doing
18 business. They can put all they want into those accounts
19 despite the temporary restraining order. It only deals with
20 taking money out of it. And the concept or the idea that they
21 can't get by since January 7th until today without taking money
22 out of their PayPal accounts is just not credible.

23 THE COURT: Well, I don't know why that's --

24 MS. BURGHARDT KRAMER: Your Honor, if I may, if I may,
25 the restraints that have been ordered by the Court also

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1 prohibits accepting funds into the PayPal account.

2 MR. DUNNEGAN: I don't see that. I don't see that,
3 Katie. Temporarily restrained from transferring, withdrawing,
4 or accepting any funds -- that means the defendants accepting
5 any funds -- from any defendant at PayPal. Certainly there's
6 no intent to prevent them from adding any amount to this
7 account.

8 THE COURT: All right. Here, you each have a task,
9 because I really find this -- I don't know -- distressing.
10 Maybe that's the wrong word. Frustrating is the better word.
11 Mr. Dunnegan, you've done nothing to really learn from PayPal
12 what's truly in the accounts and available for attachment.
13 Similarly, the defendants haven't told me anything about what
14 part of the PayPal accounts are available for possible judgment
15 and whether, you know, there are restrictions preexisting the
16 attachment. So tomorrow, as early as you can, hopefully, early
17 afternoon -- well, actually, it's a terrible day, because we
18 really all should be watching television tomorrow. But as soon
19 as you can, get me some information, and if I don't have that
20 information, I'm not comfortable, Mr. Dunnegan, I am not
21 comfortable, because someone advertised, you know, Mattel
22 dolls, whether they were a knockoff or the real thing, for 30
23 something dollars, that that is going to harm Mattel in a way
24 that is so severe that we ought to put the defendants out of
25 business. Whether they're right or wrong -- they could be

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1 totally wrong --

2 MR. DUNNEGAN: Your Honor, may I --

3 THE COURT: -- it's disproportionate. It really is.

4 MR. DUNNEGAN: Okay. Now dealing with the issue --
5 I'm sorry. Go ahead.

6 THE COURT: And you don't want, you shouldn't want,
7 the responsibility for doing that. It's disproportionate.

8 MR. DUNNEGAN: That I would be happy to take, your
9 Honor. But --

10 THE COURT: You really don't want to.

11 MR. DUNNEGAN: With respect to the issue of what
12 information we can get out of PayPal, I have a feeling that if
13 I call them up and I say, what is the amount of the lien that
14 you're asserting, that they're not going to tell me. Now --

15 THE COURT: Then you're going to be stuck with what
16 you're saying is speculative. The defendants are not giving me
17 any hard evidence either. You're going to leave me in the
18 position where the only thing I'm going to feel comfortable
19 doing is releasing a bunch of the money so that the defendants
20 can continue in business, because I'm not going to want the
21 responsibility for putting them in severe straits, given what
22 is at stake in this case.

23 MR. DUNNEGAN: Okay. May I serve a subpoena on PayPal
24 which is returnable in a couple of days?

25 THE COURT: No. Yes, you can, but that's not going

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1 to -- I think this problem has to be resolved sooner than that.

2 MR. DUNNEGAN: Sooner than Friday?

3 THE COURT: Yes, sooner than Friday.

4 MR. DUNNEGAN: Wow.

5 THE COURT: You know, you struck it rich here, you
6 thought. I mean, the point is that --

7 MR. DUNNEGAN: Did I? But see --

8 THE COURT: I don't know.

9 MR. DUNNEGAN: -- if I don't know the amount of the
10 liens and I can't get it in a subpoena which is returnable in a
11 couple of days --

12 THE COURT: Why don't we also have the defendants
13 disclose to us how many dolls they actually sold, okay? Why
14 don't we learn that too.

15 MR. DUNNEGAN: I think that's a great idea.

16 THE COURT: All right?

17 MR. DUNNEGAN: That's fine. But I think --

18 THE COURT: And they can tell me tomorrow.

19 MR. DUNNEGAN: But I think the defendants can also
20 look at their account and see how much is capable of being
21 released. I am very sure of that.

22 MS. BURGHARDT KRAMER: Your Honor, I think we need
23 some clarity here, and maybe this is information that we can
24 provide tomorrow, maybe we can get this from PayPal, some
25 clarity on the terms "reserve" versus "lien," because what I'm

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1 hearing from Mr. Dunnegan sounds to me like there may be some
2 conflation in his mind between a lien and a reserve. So my
3 understanding of a lien is an amount that PayPal says, we get
4 this money. A reserve is our money; we just don't get it
5 today. We get it in some period of time. It needs to sit
6 there, but it's our money. There's no lien on it. It's
7 just -- it needs to sit there so there's a cushion.

8 THE COURT: Right.

9 MS. BURGHARDT KRAMER: So I don't know if we need to
10 put in --

11 THE COURT: That distinction seems reasonable to me
12 that --

13 MS. BURGHARDT KRAMER: And some of this information
14 about PayPal's requirements for reserves, they have some of
15 this information available on PayPal's own website about
16 reserves, and it's clear that it's not -- the reserve doesn't
17 mean PayPal has a lien on that amount. It just means PayPal
18 says, if you're going to do business here, you need to have a
19 cushion in your account. You'll get the money. It's your
20 money. You just don't get it today. You get it in -- whatever
21 it is -- 30 days, 90 days, something like that.

22 MR. DUNNEGAN: Well, your Honor, I think it's a
23 cushion in the event that no consumers assert a claim against
24 it. I mean, PayPal isn't requiring cushions for no purpose
25 whatsoever.

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1 THE COURT: But, look, in a totally legitimate
2 business, you can still have returns.

3 MR. DUNNEGAN: Agreed.

4 THE COURT: I mean, and the point is that I'm sure
5 that, whether it's PayPal or it's Amazon, they, over time, know
6 the metrics of what is the likely percentage of returns, or
7 whether it's Bloomingdale's, whoever, and that would create
8 what Ms. Kramer describes as a reserve. That seems like a
9 reasonable business model.

10 MS. BURGHARDT KRAMER: And your Honor, what I'm
11 concerned about is that I don't want the plaintiff to conflate
12 those two ideas and say whatever amount is held in reserve is a
13 lien, because it's not. It's not a lien. It's our money. We
14 just -- it's in reserve for right now because there's some
15 possibility of some returns, some charge-backs, whatever, but
16 it doesn't mean that that full amount goes poof or it doesn't
17 mean that it's actually going to go to PayPal.

18 MR. CHEN: And by all accounts, if it's a reserve, a
19 judgment would take priority over a reserve, and there's --
20 plaintiff made no allegation that there's a lien on the money,
21 just simply that PayPal is holding a reserve, which is the
22 amount of money which the client can't withdraw but --

23 THE COURT: I understand. But by tomorrow we can get
24 a lot of clarity on the reserve policy, on what type of sales
25 of this doll we are really talking about, which would give us

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1 some kind of reality check, but as I say -- I'm being perfectly
2 candid with you -- I am not comfortable with the notion that,
3 given the nature of the claim here, that the risk of causing
4 very serious damage to a going concern is proportionate. So
5 get me some more information --

6 MR. DUNNEGAN: Yes. And your Honor --

7 THE COURT: -- and then I can make a more informed
8 judgment.

9 MR. DUNNEGAN: Now in terms of getting back to your
10 Honor, how would you like us to do that?

11 THE COURT: File on ECF.

12 MR. DUNNEGAN: A joint letter or separately or --

13 THE COURT: No. I don't expect you to agree on the
14 letter.

15 MR. DUNNEGAN: Okay.

16 THE COURT: Get me information. I think you know what
17 we're talking about. And look, there isn't any question that
18 if some amount is staying at PayPal, it has to be clear that it
19 is available to satisfy a settlement or judgment. I mean,
20 otherwise whatever is left there for this purpose, what remains
21 attached has to really be available and can't, poof, go away.

22 MS. BURGHARDT KRAMER: Your Honor, we are in the
23 process of compiling the numbers. We had planned to submit all
24 of this on Friday once we have -- once we were planning to put
25 everything in at that point, and we'll put in -- we'll plan to

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1 put in the specific numbers tomorrow. The numbers that I have
2 at this point are that the profits to our client from the sale
3 of the dolls is less than a hundred thousand.

4 THE COURT: Less than what?

5 MS. BURGHARDT KRAMER: A hundred thousand. The
6 profits. The profits; not the total sales number.

7 THE COURT: Okay.

8 MS. BURGHARDT KRAMER: The profits.

9 MR. DUNNEGAN: What would be the total sales number?

10 MS. BURGHARDT KRAMER: I need to double-check the
11 numbers.

12 MR. DUNNEGAN: Ballpark.

13 MS. BURGHARDT KRAMER: Ballpark, around 700,000.

14 MR. DUNNEGAN: Wow.

15 MS. BURGHARDT KRAMER: That's revenue, 700,000.

16 MR. DUNNEGAN: \$700,000 of "Day of the Dead" dolls?

17 THE COURT: I wouldn't buy one.

18 MS. BURGHARDT KRAMER: That's the information that I
19 have. This should bring us into --

20 MR. DUNNEGAN: That's substantially different than the
21 15 or \$30,000 that Mr. Chen was talking about earlier.

22 MS. BURGHARDT KRAMER: Well, we were talking about the
23 numbers that you were putting out there, Mr. Dunnegan.

24 MR. DUNNEGAN: My numbers were just what was taken
25 from your website.

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1 MS. BURGHARDT KRAMER: Right. And we didn't mean to
2 suggest that there actually were 500 sales. We were
3 piggybacking off of what you were saying.

4 MR. CHEN: I think the records show that there were
5 500 sales in New York State, and the remaining sales were other
6 places in the United States.

7 MR. DUNNEGAN: Well, your Honor, those numbers are
8 larger, substantially larger than what I expected, for what
9 it's worth.

10 MR. CHEN: But also substantially smaller than -- if
11 the Court were to take into consideration the profits that were
12 made on each sale, that comes far short of the 2.8 million.

13 MR. DUNNEGAN: Agreed.

14 MS. BURGHARDT KRAMER: And what we're talking about
15 here -- and we'll put all of this into a filing with the Court
16 tomorrow -- we're talking about a really short time period when
17 this product was offered for sale. It was offered for sale for
18 a very short time period and then it was actually -- Yokawa had
19 pulled the product. So they ceased the sales. It's no longer
20 being sold. So there is no risk of any sort of ongoing sales.
21 We have a fixed period of time that this product was being
22 sold, and a pretty short period.

23 MR. DUNNEGAN: And if I may, you're not disputing that
24 these were either nonexistent products that were never
25 delivered or counterfeit; is that a fair statement?

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1 MS. BURGHARDT KRAMER: I'm not stating that at all.

2 MR. CHEN: That were delivered. With the exception
3 of, in your case, I think that was after, when the client
4 stopped selling of the goods.

5 MS. BURGHARDT KRAMER: To be clear, we do intend to
6 fully defend the case on the merits.

7 MR. DUNNEGAN: So is it your position that you were
8 selling legitimate Mattel products to the tune of \$700,000?

9 MS. BURGHARDT KRAMER: No. We were selling dolls.

10 THE COURT: Which on your website you described as
11 Mattel dolls?

12 MS. BURGHARDT KRAMER: No. We didn't use the word
13 "Mattel."

14 MR. DUNNEGAN: Barbie.

15 THE COURT: Barbie. I'm sorry. But which you
16 described as Barbie dolls?

17 MS. BURGHARDT KRAMER: In a couple of places.

18 MR. CHEN: Basically the situation is --

19 THE COURT: Mattel owns the trademark.

20 MR. CHEN: Basically the situation is, our client's
21 internal processes did not -- because they're not United States
22 based, they're Hong Kong based, they didn't realize that Barbie
23 was a infringing statement. They thought Barbie was in the
24 generic, which, you know, doesn't change the fact that what
25 they did was to the point where they stopped selling the

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1 products when that came to their attention. But when they
2 initially started selling it, for just a short period of time,
3 they didn't know that it was -- they didn't intend to infringe.
4 They simply -- they thought they were selling the generic
5 Barbie dolls. They didn't intend to sell specifically Mattel
6 Barbie dolls.

7 THE COURT: Didn't the dolls that you sold look
8 identical to the ones that Mattel sells?

9 MR. CHEN: I think the manufacturer -- they approached
10 the manufacturer for pictures and the manufacturer gave them
11 pictures. Whether the manufacturer took the pictures
12 themselves or took the pictures off Mattel's site, our client
13 is looking into, but at the time when they published it, they
14 had no idea that Mattel had the "Day of the Dead" Barbie dolls.

15 THE COURT: I'm not sure I follow that, but I'm sure
16 you'll try to clarify that.

17 MR. CHEN: Yes, and we --

18 THE COURT: Just by happenstance they just came upon a
19 "Day of the Dead" doll, called it a Barbie, but didn't have any
20 idea --

21 MR. CHEN: I suspect that --

22 THE COURT: -- that Mattel sells a "Day of the Dead"
23 Barbie doll?

24 MR. CHEN: I suspect that the manufacturer who pitched
25 the idea might have known that it was infringing, but our

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1 client did not.

2 THE COURT: Was the manufacturer the same guy who
3 makes the dolls for Mattel? Mattel will be interested in
4 knowing that.

5 MR. CHEN: Yeah, absolutely.

6 THE COURT: And it might help you in resolving this
7 case to let them know who the manufacturer of your dolls was so
8 that they might take their ire out on the manufacturer and make
9 sure that they don't give him any more business because he's
10 gone behind their back and, in the vernacular, screwed them.

11 MR. CHEN: It wouldn't surprise me if that was the
12 case. We told our client to get as much information --

13 THE COURT: It wouldn't surprise me either.

14 MR. CHEN: -- on the manufacturer as possible.

15 THE COURT: Okay.

16 MS. BURGHARDT KRAMER: Certainly in due course we
17 expect that we'll get into all of this in more detail. The
18 immediate question was how many products we're talking about,
19 what are the lost profits here, what are the actual profits.

20 THE COURT: And the other thing is, we need to get
21 some clarity on what money that's in the PayPal accounts is
22 really available, and if it turns out to be a really solid
23 number, we'll leave it at the attachments on the assumption
24 that PayPal knows better than to violate a federal court order.

25 MR. CHEN: They've already shown that. I think PayPal

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1 has --

2 THE COURT: They seem to be, yes.

3 I look forward to receiving stuff from you as early
4 tomorrow as possible. Okay?

5 MS. BURGHARDT KRAMER: Certainly.

6 THE COURT: Okay, guys.

7 MR. DUNNEGAN: Thank you, your Honor. Thank you very
8 much.

9 THE COURT: Okay.

10 MR. CHEN: Thank you, your Honor.

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